Supreme Court, U.S.
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No. 07-467

In The
Supreme Court of the United States

AVRIL ADAMS,

Petitioner,

v.

STATE OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, a public entity; DONNATA MORELAND; OAKTREE INVESTIGATIONS, a business entity and consumer reporting agency; LAURENCE A. CORBIN, individually as an investigator for Oak Tree Investigations; PATRICA ECHARD; PAULETTE BAKER; PATRICK KENNELLY, individually and as a supervisor; LAVONNE COEN, individually and as a supervisor,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Avril Adams filed an action in state court which was removed to federal court. She moved to amend the complaint to add new causes of action against existing defendants and causes of action against new defendants. The trial court denied the motion, so Adams filed a new complaint setting forth the new causes of action, which the district court then dismissed with prejudice. The Ninth Circuit affirmed the dismissal. The questions presented are:

1. Whether the Ninth Circuit Court of Appeals erred in holding that a court may use its inherent powers to dismiss *with prejudice* a lawsuit for misconduct, where the trial court's order to show cause and order of dismissal did not mention any exercise of the trial court's inherent powers, and the order of dismissal had no finding of bad faith or misconduct on the part of Adams or her trial counsel?

2. Whether the Ninth Circuit Court of Appeals erred in holding that a party commits misconduct meriting dismissal of an action *with prejudice*, where the action arises from the same nucleus of facts as an earlier-filed action, but asserts new and different causes of action against new and different defendants, and the plaintiff was denied leave to amend the earlier-filed complaint to add the new causes of action and new defendants?

QUESTIONS PRESENTED – Continued

3. Whether the Ninth Circuit Court of Appeals violated Adams's due process rights when it held that her filing of her complaint was misconduct meriting dismissal under the inherent powers of the trial court, when the trial court never so held, and the Ninth Circuit panel never gave advance notice that it was independently considering affirming the dismissal as a sanction?

PARTIES TO THE CASE

This petition is in respect of a decision of the Ninth Circuit Court of Appeals, *Adams v. State of California Dept. of Health Services,* 487 F.3d 684 (9th Cir. 2007).

The plaintiff, appellant and petitioner is Avril Adams, an individual.

The Respondents in the lawsuit are the State of California Department of Health Services, a government entity; Oaktree Investigations, a business entity of unknown form; and the individuals Donnata Moreland, Laurence A. Corbin, Patricia Echard, Paulette Baker, Lavonne Coen and Patrick Kennelly.

None of the Respondents or their counsel appeared at the trial court level or the appellate court level. Though the Ninth Circuit's opinion states that Martin Milas of the California Department of Justice appeared in the case, that is false; he never appeared or filed any document (Mr. Milas was counsel in the companion case, *Adams I*, discussed below).

Petitioner Adams's two petitions for rehearing alerted the panel to this error, but for unknown reasons it was not corrected.

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PETITION FOR A WRIT OF CERTIORARI

Under the well-established principle of res judicata (also called claim preclusion), the ultimate resolution of a lawsuit by entry of final judgment bars relitigation of the claims actually litigated plus those that could have been brought which arise from the same facts. *Nevada v. United States,* 463 U.S. 110, 129-130 (1983). In this case, the Ninth Circuit Court of Appeals has altered the firmly-established formula of res judicata, by providing that when a trial court has denied leave to amend a complaint to add new and different causes of action against new parties, the plaintiff is forever barred from litigating these new claims by filing a new lawsuit, on the grounds that filing the second suit is "misconduct".

The Ninth Circuit's grounding of the dismissal on exercise of the trial court's inherent sanction powers explicitly conflicts with this Court decision in *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767 (1980), mandating "a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers." There was no such specific finding in the trial court's order of dismissal. Pet. App. C. The decision also conflicts with numerous other circuit precedents which set out specific notice and procedural preconditions for the imposition of sanctions under the trial court's inherent powers, none of which were met. This holding is

not an aberration, but the latest in a series of decisions where the Ninth Circuit has expanded the definition of litigation "misconduct" to cover litigation tactics and strategies that are reasonable and legitimate.

The Ninth Circuit's decision also breaks with every other circuit to have considered the question of overlapping litigation in federal court, frustrates the absolute right of a plaintiff to reconfigure her complaint pursuant to Fed. R. Civ. P. 41(a)(1), conflicts with the principles articulated in this Court's decisions in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.,* 342 U.S. 180 (1952) and *United States v. The Haytian Republic,* 154 U.S. 118 (1894), and creates a pernicious incentive for plaintiffs to overlitigate their lawsuits from the beginning to avoid the possible loss of valid causes of action down the road. Perhaps more important, it radically alters the long-accepted implementation of res judicata by allowing termination of a potentially overlapping lawsuit earlier than entry of judgment.

This Court should therefore grant this petition for certiorari. Because none of the defendants in this matter ever appeared before the trial court or the Ninth Circuit Court of Appeals, there likely will be no oppositions filed, so summary reversal would be apt.

OPINIONS BELOW

The Ninth Circuit's second opinion in this action, dated July 5, 2007, Pet. App. A, is published at 487 F.3d 684. The Ninth Circuit's July 5, 2007 order denying the petitions for rehearing and rehearing en banc, Pet. App. D, is unpublished. The first opinion in the matter, dated February 13, 2007 and found at 2007 WL 446582, was withdrawn by the panel upon grant of a petition for panel rehearing; a copy is attached as Pet. App. B. The trial court's September 24, 2004 order of dismissal is attached as Pet. App. C.

BASIS FOR JURISDICTION

The Ninth Circuit Court of Appeals issued its order denying Adams's Petitions for Rehearing and Rehearing en banc on July 5, 2007. Pet. App. D. Adams invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The relevant statutory and constitutional provisions are set forth in Pet. App. E, and include the Fifth Amendment to the United States Constitution, California Code of Civil Procedure Section 335.1 and Federal Rule of Civil Procedure 41(a)(1).

STATEMENT OF THE CASE

Plaintiff, Appellant and Petitioner Avril Adams filed her initial lawsuit against the California Department of Health Services ("CDHS") for rescinding her offer of employment following an order by the California State Personnel Board that she be hired "subject to her successful completion" of the certification process. (This lawsuit shall be referred to as "*Adams I*"). Adams was disqualified for the position based on a medical examination by a Dr. Weyers, who was a defendant in *Adams I*. Adams successfully challenged the disqualification before the State Personnel Board, which ordered Adams to take a pulmonary test which she passed. Subsequently Dr. Weyers withdrew his medical restrictions, finding that Adams was fully physically capable of performing all of the duties of the position she sought.

The reward for Adams's perseverance in challenging the erroneous result from her physical examination was termination of the conditional job offer on the grounds that she had displayed a bad attitude in written and telephonic conversations with State employees. The CDHS officials complained of "Adams challenging a CDHS employee to a race during the SPB hearing, making numerous phone calls, and sending emails and letters to CDHS employees in which Adams's tone was "rude," "discourteous," "abrupt," "angry," and "challenging in a demeaning way." Pet. App. A4-A5.

Adams sued CDHS, Weyers and two other individuals for various civil rights-related claims in state court. The case was removed to federal court. Pet. App. A5-A6.

Four months after the deadline for filing an amended complaint had passed,

> Adams filed a motion for leave to amend her complaint, so as to add defendants Oaktree Investigations and Oaktree investigator Corbin, as well as DHS employees Echard, Baker, and Kennelly. In her proposed amended complaint she alleged four additional claims: (1) violation of the FCRA; (2) violation of the California Investigative Consumer Reporting Agencies Act ("ICRA"), CA CIVIL § 1786 et seq.; (3) infringement of her civil and constitutional rights in violation of 42 USCA §§ 1981, 1983, 1985; and (4) declaratory relief.
>
> Finding that Adams failed to demonstrate good cause for the undue delay in seeking leave to amend, and that granting her motion to amend would prejudice the defendants already named in her complaint, the district court denied Adams's motion as untimely.

Pet. App. A6-A7.

On September 2, 2004, after the district court denied her motion for leave to amend in the first case, Adams filed the complaint in this present action. In her complaint in this case, Adams set forth the four

additional claims she had sought to add by her previously denied motion for leave to amend her complaint in *Adams I*. Pet. App. A6-A7.

Within three weeks of filing of the new complaint, the district court issued a terse order to show cause why the new complaint should not be dismissed and sanctions imposed pursuant to Fed. R. Civ. P. 11. Pet. App. C1-C2. The order to show cause failed to articulate in any detail the rationale for such a dismissal; in particular, there was no mention of the trial court's inherent powers. After briefing by the Adams's trial counsel, the district court held that "dismissal of the newly filed action is appropriate" and entered a dismissal with prejudice. Pet. App. C4. The trial court made no finding that Adams or her trial counsel had acted in bad faith, nor were the threatened sanctions under Fed. R. Civ. P. 11 ever imposed. Pet. App. C1-C4.

The defendants in this suit never appeared in the district court or in the appeal. Though the opinion lists the counsel in the appeal as Mr. Deren (the trial court counsel and counsel on the initial appeal) and California deputy attorney general Milas, this assertion is both false and misleading: false, because Mr. Milas never appeared, and misleading, because it suggests that the trial court's action was the process of a contested adversarial proceeding rather than sua sponte action of the trial court.

Adams filed a timely appeal of the trial court's dismissal order in *Adams II*. The defendants neither

entered an appearance nor filed any brief in the appeal. The panel canceled oral argument, then on February 13, 2007 issued a published decision affirming the trial court's order dismissing the *Adams II* complaint with prejudice on the grounds that the instant lawsuit was barred because it would be claim-precluded by *Adams I*. Pet. App. B1-B17. Nowhere in the initial opinion was there a statement that Adams or her counsel had acted in bad faith or committed misconduct.

Adams filed a timely petition for rehearing and rehearing en banc, arguing that the application of claim preclusion principles was erroneous; that the case law cited in the opinion expressly limited a district court to dismissal without prejudice of completely identical, parallel lawsuits, and that the Court of Appeals' application of claim preclusion to lawsuits which have not reached the final judgment stage created an insoluble procedural Catch-22. The panel granted the petition for panel rehearing on May 7, 2007 and issued a new opinion that substantively altered the basis for affirming the trial court. According to the reissued opinion, the dismissal was no longer based on res judicata (i.e. claim preclusion), but rather was an example of the district court's inherent "power . . . [to] impose sanctions including, where appropriate, default or dismissal." Pet. App. A7. The panel further clarified the new basis for its opinion in a footnote addressing one of the cases raised in the successful petition for rehearing: "Thus, because the filing of a duplicative complaint was

abusive, our affirmance of the district court's dismissal does not contravene the rule established in *Atchinson* that "district courts have inherent power to control their dockets, but not when its exercise would nullify the procedural choices reserved to parties under the federal rules." Pet. App. A9-A10 n.1, *quoting Atchison, Topeka and Santa Fe Railway Co. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (1998). The panel opinion neither addressed the absence of any statement by the trial court that it was relying on its inherent power in the order to show cause or its order dismissing the opinion, nor discussed the absence of any specific finding of bad faith by the trial court.

Adams timely filed a petition for rehearing and rehearing en banc, which was denied on July 5, 2007. Pet. App. D1-D2.

REASONS WHY THE PETITION SHOULD BE GRANTED

1. The Ninth Circuit's Decision in this Case Directly Conflicts with this Court's *Roadway Express* Decision Requiring an Explicit Trial Court Finding of Bad Faith for Imposition of "Inherent Power" Sanctions.

In the original Ninth Circuit opinion in this action issued on February 13, 2007, the Ninth Circuit affirmed the trial court's decision to dismiss the *Adams II* action without any finding that Adams or her counsel had committed misconduct. Pet. App. B.

After Adams's petition for rehearing pointed out that the case law directly prohibited dismissal with prejudice of an action identical with another pending action, the Ninth Circuit's panel changed the grounds for its decision, and instead held that the dismissal with prejudice was an exercise of the trial court's "inherent power" to sanction "misconduct." Pet. App. A9 at n.1. This new ground was a complete surprise to Adams, because the trial court's order to show cause never mentioned the imposition of a sanction under the trial court's "inherent powers" and made no finding of bad faith or misconduct in its dismissal order. Pet. App. C1-C3.

This Court has explicitly held that a sanction under a trial court's inherent powers may not be imposed without an explicit finding of bad faith on the part of a litigant or the litigant's counsel. In affirming the reversal of a trial court's imposition of sanction supposedly under its inherent powers, this Court wrote that:

> Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would have to precede any sanction under the court's inherent powers.

Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

The Ninth Circuit's decision in *Adams II* directly and explicitly conflicts with *Roadway Express* and the

other circuit opinions which follow it. *See, e.g., Willhite v. Collins,* 459 F.3d 866, 870 (8th Cir. 2006); *First Bank of Marietta v. Hartford Under.,* 307 F.3d 501, 517 (6th Cir. 2002); *DLC Management Corp. v. Town of Hyde Park,* 163 F.3d 124, 136 (2d Cir. 1998).

Adams II is no aberration in the jurisprudence of the Ninth Circuit, but rather the latest in a series of decisions which approve the invocation of the inherent powers of the court to punish litigation conduct which is completely appropriate. To take one example, in *Hernandez v. City of El Monte,* 138 F.3d 393 (9th Cir. 1998), a district court dismissed an action with prejudice due to the filing of a parallel lawsuit in state court. The *Hernandez* panel (which shared one member with the panel in *Adams II*) found that filing a parallel lawsuit in state court constituted the misconduct of "judge shopping" that could merit the exercise of a trial court's inherent power. *Id.* at 398 ("the circumstances presented could fairly support a determination that the plaintiffs were trying impermissibly to judge-shop"). This holding flies in the face of this Court's repeated rulings that parallel state and federal lawsuits are generally permissible. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280, 293-294 (2005).

To take a second example, in a motor vehicle product liability action a district court entered the facially questionable in limine rulings that the plaintiff's drunken status and failure to wear a seatbelt could not be introduced into evidence in the case. *Lasar v. Ford Motor Co.,* 399 F.3d 1101, 1105-1106

(9th Cir. 2005). The defendant's counsel made an opening statement which scrupulously avoided mentioning either fact, but the plaintiff's counsel convinced the judge that references to "establishments" visited by the plaintiff and the plaintiff's "free-floating body" during the accident violated the in limine orders. The Ninth Circuit here found that the defending counsel deliberate efforts to craft a compliant opening statement demonstrated "bad faith". *Id.* at 1114 -1115.

Adams II is thus the latest decision of the Ninth Circuit to validate the exercise of the inherent power of a court to impose sanctions where the allegedly wrongful conduct cannot fairly be reproached, and the requisite findings of bad faith are either completely absent or facially incredible. This is extremely harmful. Within the Ninth Circuit, the validation of the imposition of "inherent power" sanctions to such manifestly reasonable litigation tactics such as filing parallel state and federal lawsuits ensures that counsel become timorous in the prosecution of lawsuits and the exercise of constitutional or procedural rights.[1] If *Adams II* stands, other circuits may well

[1] Indeed, *Adams II* is nothing more than an extension of the erroneous ruling in *Hernandez*; like *Hernandez, Adams I* and *Adams II* involved a state court case that was removed to federal court, creating a federal parallel litigation issue for a plaintiff whose real desire was to stay in state court If *Adams II* is not reversed, the inexorable result will be judicial decisions which penalize plaintiffs and attorneys for exercising the parallel litigation rights vindicated by this Court in *Exxon Mobil*.

conclude that this Court has abandoned *Roadway Express* and has tacitly approved the string of decisions culminating in *Adams II*.

In *Roadway Express*, this Court affirmed the Court of Appeals' reversal of the trial court, but remanded the case for determination of whether the litigant had acted with bad faith. In this case, no such remand would be appropriate, because, as discussed in the next section, the litigation conduct of Adams's trial counsel should never lead to the sanction of dismissal of a complaint with prejudice.

2. The Court Should Grant Certiorari to Review the Radical Revision of the Settled Application of Res Judicata.

Adams II completely upends the well-settled doctrine of res judicata. The Ninth Circuit's substantive analysis consisted of three steps. First, the panel opinion asserted that there is an absolute policy against "duplicative lawsuits" under federal law. Second, it found that because the instant lawsuit arose from the same nucleus of facts as the first lawsuit, the second lawsuit was "duplicative" for purposes of dismissal. Finally, it held that dismissal with prejudice was appropriate because "Adams was required to bring at one time all of the claims against a party or privies relating to the same transaction or event." Pet. App. A9 at n.1.

Each step of the Ninth Circuit's analysis veers sharply from the well-settled principles of res judicata enunciated by this Court and the other circuit Courts of Appeals. With respect to the first and second steps, the federal policy against simultaneous, duplicative lawsuits only covers lawsuits which are precisely identical in terms of the causes of action, relief requested, and defendants, which was manifestly not the case with *Adams II*. With respect to the third step, there has never been any absolute requirement that a party must "bring at one time all of the claims against a party or privies relating to the same event", and *Adams II* effectively terminates the most important exception to the application of res judicata as well as the right of a plaintiff to one "do-over" under the rules of civil procedure. The effective result is that res judicata potentially applies to a lawsuit not when a final judgment is entered, but rather when the lawsuit is filed, and an important procedural right has been gutted. This shift in the law of claim preclusion is so significant that it merits review by this Court.

The Ninth Circuit cited two decisions of this Court in support of its analysis, *United States v. The Haytian Republic,* 154 U.S. 118 (1894), and *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952); both decisions in fact lie one hundred and eighty degrees in opposition to the Ninth Circuit's analysis in *Adams II*. In *The Haytian Republic* the United States government instigated civil asset forfeiture proceedings against a ship. After the

litigation was initiated in the district court for Washington and a bond posted, the United States government initiated additional proceedings in the Oregon district court for closely related statutory violations. The Oregon district court dismissed the second action as barred by the first, but this Court reversed. This Court first acknowledged, in the argumentative preface, that "[a] former judgment between the same parties in which a claim was decided or was properly involved and might have been decided is a bar to another action or suit as to such claim." *Id.* at 124. But this Court then rejected the claim preclusion approach for a narrower rule, holding that dismissal of a lawsuit based on pendency of another lawsuit requires exact unity between the individual causes of action for dismissal to be appropriate:

> "When the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interest, there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title, or essential basis of the relief sought, must be the same."
>
> Tested by these principles, it is obvious that the plea of pendency of the suit in Washington was not available here.
>
> . . . .
>
> This statement, however, is qualified by the following, which is not included in the

> citation: "But this principle does not require distinct causes of action – that is to say, distinct matters – each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together."

Haytian Republic, supra, at 124-125 (internal citations omitted).

In *Haytian Republic* this Court held that only precisely identical lawsuits pending simultaneously permit dismissal of the second lawsuit; where "distinct causes of action – that is to say, distinct matters – each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together", the existence of the prior lawsuit concerning one set of causes of action cannot result in the dismissal of a second lawsuit comprised of different causes of action, even where the causes of action arose from the same set of facts and could have been brought together. The situation in *Haytian Republic,* where this Court reversed the dismissal of the second lawsuit, is precisely the same procedural situation in *Adams II.*

Sixty years later this Court visited a new variation on the *Haytian Republic* fact pattern in *Kerotest. Adams II* cites *Kerotest* for its claim that dismissal is an appropriate remedy as follows:

> the district court did not abuse its discretion in electing to dismiss the second action with prejudice. *cf, Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952).

Pet. App. A19-20.

This Court held nothing of the sort in *Kerotest*. In that litigation, C-O-Two Fire filed a lawsuit for patent infringement in Illinois district court against Acme Equipment Company. The infringing device was actually manufactured by Kerotest, which filed suit in Delaware seeking a declaratory judgment for non-infringement and invalidation of the relevant patents. Thus in *Kerotest* there were two lawsuits concerning the same facts but with different parties in different courts seeking remedies that were formally different, though in fact would lead to the same practical result. Each plaintiff sought to stop the plaintiff in the other forum from proceeding with the litigation initiated in the other forum; the question before this Court was which lawsuit should go forward, and which should be enjoined. *Kerotest* thus did not involve issues of identical or similar claims among identical parties, but overlapping lawsuits by different parties arising from the same issues.

The language quoted by the Ninth Circuit in ostensible support for its view that dismissal with prejudice is an appropriate remedy in fact appears in a completely different context:

> The Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation

> by different parties to many-sided transactions, has created complicated problems for coordinate courts. Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems.
>
> . . . .
>
> If the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere.

Kerotest, supra, at 183-186.

Though the Ninth Circuit asserted that *Kerotest* approves of dismissing simultaneously duplicative lawsuits for claim preclusive reasons, in reality it counsels that duplicative litigation in different courts may be enjoined, not dismissed, where the first forum in which the suit is instigated can accommodate all parties; if not all parties can be joined in one forum, then separate litigation might be the best course of action.

Based on *Haytian Republic* and *Kerotest*, the Courts of Appeals have created an extremely narrow rule concerning overlapping litigation: that "[p]laintiffs generally have no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the

same defendant." Pet. App. A8-A9, *quoting Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) (internal quotes omitted). Where two "virtually identical" lawsuits alleging the same causes of action against the same defendants have been filed, the Courts of Appeals have held that the correct procedure is as follows:

> When the district court became aware that the two actions begun by Mrs. Walton were virtually identical, it could have dismissed her second complaint ***without prejudice*** or it could have stayed proceedings in the second action until judgment was entered in the first.

Walton, supra, at 70 (bold italics emphasis added).

Obviously, *Adams II* does not meet the narrow criteria identified in *Walton*, since the actions did not arise from completely identical subject matter, and the two actions were not against the same defendant or defendants.

In another case cited in both of the *Adams II* opinions, the Second Circuit reversed the dismissal of the second pending suit arising from the same nucleus of facts on the grounds that it was not exactly duplicative of the first lawsuit. In so doing, it stated that:

> Because of the obvious difficulties of anticipating the claim or issue-preclusion effects of a case that is still pending, a court faced with a duplicative suit will commonly stay the second suit, dismiss it ***without prejudice***,

> enjoin the parties from proceeding with it, or consolidate the two actions. *See Kerotest Mfg.*, 342 U.S. at 186 (stay); *Devlin v. Transportation Communications Int'l Union,* 175 F.3d 121, 129-30 (2d Cir. 1999) (remanding for consideration of consolidation); *First City,* 878 F.2d at 80 (dismissal without prejudice); *National Equip. Rental, Ltd. v. Fowler,* 287 F.2d 43, 45-46 (2d Cir. 1961) (parties enjoined).

Curtis v. Citibank, N.A., 226 F.3d 133, 138 (2d Cir. 2000) (bold italics emphasis added).

Prior to *Adams II* there is not a single example of a federal appellate court upholding the dismissal with prejudice of a second-filed complaint arising from the same facts as an earlier complaint, and there is likewise no example of a federal appellate court dismissing a later-filed lawsuit where the second complaint does not allege identical claims against the same defendant as another pending lawsuit.[2] The Ninth Circuit's decision has no precedent in the published appellate case law, and no support from the existing decisions from this Court or other circuits.[3]

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[2] The closest a court ever came was *Hernandez, supra,* where the Ninth Circuit panel agreed that the filing of the parallel lawsuit in state court was wrongful, but found in that case that dismissal was too harsh a punishment.

[3] The Ninth Circuit ducks the precedental problems by terminological confusion in claim preclusion analysis. There are three separate components to res judicata (i.e. claim preclusion):

(Continued on following page)

It completely upends settled law.

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the first component is whether the exact same cause of action exists between two lawsuits. The second component is whether a cause of action which is different from those in the first lawsuit (by virtue of being a different legal theory or being made against a different person) could practically have been brought in that lawsuit. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry,* 449 U.S. 90, 93 (1980). The third element is whether one of the exceptions to application claim preclusion applies.

Under the duplicative litigation doctrine, however, only the first kind of claims – completely duplicative claims against the same defendants – are subject to dismissal. The new statutory causes of action asserted in *Adams II* were plainly not the same causes of action as in *Adams I,* and the cause of action that was repeated was asserted against new parties. The second element of claim preclusion analysis has no role in determining whether a duplicative lawsuit should be dismissed.

The fundamental issue under the new causes of action in *Adams II* under 15 U.S.C. §1681 and Cal. Civ. Code §1786.18-26 is not consent, as claimed by the Ninth Circuit, but whether the information provided was to the maximum extent lawful, accurate and complete.

As this Court stated,

> Congress enacted the FCRA in 1970 to promote efficiency in the Nation's banking system and to protect consumer privacy. See 15 U.S.C. § 1681(a) (1994 ed.). As relevant here, the Act seeks to accomplish those goals by requiring credit reporting agencies to maintain "reasonable procedures" designed "to assure maximum possible accuracy of the information" contained in credit reports, § 1681e(b), and to "limit the furnishing of [such reports] to" certain statutorily enumerated purposes, § 1681e(a); 15 U.S.C. § 1681b (1994 ed. and Supp. V).

TRW Inc. v. Andrews, 534 U.S. 19, 22 (2001).

The practical effect of the expansion of the "duplicative litigation rule" is clear. Under well-settled principles of common law, only a final judgment invokes claim preclusion. *See, e.g., Exxon Mobil, supra,* at 544 U.S. at 293; *Rivet v. Regions Bank of Louisiana,* 522 U.S. 470, 476 (1998). Under *Adams II,* the full scope of claim preclusion potentially applies when a lawsuit is filed.

This expansion of claim preclusion breaches an important principle: that it is never misconduct to take procedural stances directly or indirectly permitted under the code of civil procedure. Under Fed. R. Civ. P. 41(a)(1), a plaintiff may one time dismiss a lawsuit without prejudice and then refile it with any and all added causes of action.

Under this rule, after Adams was denied leave to amend her complaint, she was fully entitled to dismiss her initial lawsuit without prejudice, then refile

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The determination that Adams's civil rights were or were not violated by the State of California in *Adams I* says nothing about the information inputs that were supplied by private parties. The new statutory causes of action could have reached a different result than the civil rights causes of action; the evidentiary facts would have been different on the essential parts of the statutory claims; and the rights at play in the two lawsuits (the constitutional right to due process from the State of California versus the completely statutory rights to furnishing of lawful, complete and accurate information in an employment investigation) were utterly different. Indeed, even entry of judgment in the first suit did not operate as a bar, because the trial court's decision to deny leave to amend effectively denied Adams's ability to prosecute all of the claims together.

the combined lawsuit, as she was well within the two-year California personal injury statute of limitation, Cal. Code Civ. Proc. §335.1, that governs civil rights claims.

Given that the federal rules explicitly permitted Adams to restart a combined *Adams I* and *Adams II* from scratch, the decision to keep *Adams I* on schedule by filing *Adams II*, instead of dismissing and refiling a combined complaint, cannot legitimately be called "misconduct". Under the law in other circuits, even if there had been actual cause of action by cause of action overlap in the lawsuits, the most that could be done would have been a dismissal without prejudice, in which case Adams's counsel could have exercised her right to dismiss under Rule 41(a)(1) and a new combined complaint would have been filed.

The Ninth Circuit's holding in this case creates an extraordinarily perverse incentive: where a trial court finds that a motion for leave to amend is too close to the trial date, a plaintiff in Adams's position will now be forced to restart everything rather than obtain at least a partial disposition of the case. Moreover, by entering an order of dismissal with prejudice prior to the appearance of any of the defendants, the district court directly frustrated Adams's right under the federal rules to a single "do-over" by dismissal of *Adams I*. Conceding that "district courts have inherent power to control their dockets, but not when its exercise would nullify the procedural choices reserved to parties under the federal rules," the Ninth Circuit failed to recognize that its action essentially nullified

the exercise of Fed. R. Civ. P. 41(a)(1) in this case. Pet. App. A9-A10 n.1.

Even where claim preclusion clearly applies, a defendant can lose the right to assert it, or to otherwise object to overlapping lawsuits. The Restatement of Judgments lists a half-dozen reasons why a plaintiff can file two lawsuits in the same forum arising from the same nucleus of facts. Restatement (Second) of Judgments §26. The most important justification is, of course, waiver. The revised panel opinion concedes that res judicata is an affirmative defense, which if not pursued by a defendant is waived. Pet. App. A19-A20 n.2. The same is true of the duplicative litigation doctrine; if a party fails to raise an objection to two simultaneously overlapping lawsuits, they can both proceed to judgment. *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988) ("Moreover, Tenneco, by never objecting to separate trials of the price and supply cases, cannot now object to their being split. Restatement (Second) of Judgments § 26(1)(a) (1982).") (footnotes omitted). By allowing the trial court to dismiss *Adams II* sua sponte without any appearance of the defendants, the Ninth Circuit has essentially blacked out the common law of waiver applicable to res judicata defenses.

Viewed as a whole, *Adams II* radically amends the law of claim preclusion enunciated by this Court and Courts of Appeals headquartered east of San Francisco. In the Ninth Circuit, claim preclusion potentially applies from the filing of a lawsuit, as

opposed to entry of final judgment; the right to one do-over of the complaint under Fed. R. Civ. P. 41(a)(1) has been substantially impaired; and a trial court may override a defendant's failure to plead claim preclusion or other waiver of the defense by labeling the filing of a second related lawsuit as "misconduct". The tectonic shift in claim preclusion law is so substantial, the conflict with decisional law so obvious, and the implications on procedure are so broad, that review by this Court is clearly merited.

The Ninth Circuit's revision of res judicata cannot be viewed as a desirable modification of the law, as it creates exceptionally perverse incentives at the initiation of a lawsuit. When filing a complaint, the current federal rules promote the prosecution of only those claims with verifiable factual support, and putting aside the assertion of claims which the plaintiff suspects may exist for confirmation via discovery.[4] With *Adams II* on the books, litigants must now seriously consider filing every possible cause of action from the beginning because of the risk that such

[4] There are often strong tactical reasons requiring an attorney to substantially delay filing additional causes of action or adding new defendants from the time discovery reveals facts allowing filing of a claim: these reasons can include progress in confidential and sensitive settlement discussions; shifting assessments of the cost-benefit balance in bringing new claims and defendants; and perhaps most important, the fact that it is often better to avoid antagonizing potential ancillary defendants while they are proving truthful and cooperative in building a case against the primary defendants, rather than suing them and thus forcing an adversarial and obstructionist stance.

claims may otherwise be forever lost if a trial court forms the opinion that the motion for leave to amend was filed too long after discovery revealed supporting facts.

This Court should grant certiorari to reign in the unjustified and injurious alteration of claim preclusion law.

3. The Sua Sponte Dismissal and Post-Hoc Affirmance of Dismissal as a Sanction for "Misconduct" Conflicts with Due Process Principles in Force in Every Other Circuit.

Before a federal court may impose sanctions on a party or an attorney, the due process clause of the Fifth Amendment requires that the party or attorney threatened with sanctions be informed of the potential penalty and the legal grounds of the threatened sanction, and receive as well an opportunity in advance to address the question. *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350, 1357 (3d Cir. 1990); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 379 (3d Cir. 1997) ("The party against whom sanctions are being considered is entitled to notice of the legal rule on which the sanctions would be based, the reasons for the sanctions, and the form of the potential sanctions"); *Fuqua Homes v. Beattie*, 388 F.3d 618, 623 (8th Cir. 2004) (failure of trial court to identify specific grounds of sanctions requires reversal); *Prosser v. Prosser*, 186 F.3d 403, 406 (3rd Cir. 1999) (holding that "due process requires that the parties have

sufficient notice of the form of the sanctions being considered by the court because the issues that must be addressed may differ depending on the form"); *RTC v. Dabney,* 73 F.3d 262, 268 (10th Cir. 1995) (holding that sua sponte sanctions payable to court without advance notice and opportunity to be heard is a violation of due process); *National Collegiate Athletic Ass'n,* 134 F.3d 1438, 1443-1444 (10th Cir. 1998); *Mackler Prod., Inc. v. Cohen,* 146 F.3d 126, 129 (2d Cir. 1998); *Law v. Satcorp Intern. v. China Nat'l Silk Import Co.,* 101 F.3d 3, 5-6 (2d Cir. 1996). *Adams II* directly conflicts with the decisional law of all the other circuits on this issue.

The trial court threatened to impose sanctions pursuant to Fed. R. Civ. P. 11, but did not do so. Pet. App. C. Indeed, the trial court never found any bad faith or misconduct on the part of Adams or her trial counsel. The Ninth Circuit's original opinion, dated February 13, 2007, did not ground its decision on any finding of bad faith or misconduct. Pet. App. B1-B17.

It was only after Adams's new counsel demonstrated that existing precedent barred the dismissal with prejudice of even completely duplicative actions that the Ninth Circuit decided to publicly find that trial counsel had committed misconduct by engaging in the "abusive" litigation tactic of filing *Adams II*.

The Ninth Circuit's revised opinion, by publicly reproving Adams for engaging in "abusive" litigation, is itself a sanction. It is a sanction that the trial court did not impose, but came sua sponte from the Ninth

Circuit panel. It should not have been imposed without offering Adams an opportunity to brief the application of the allegedly sanctionability of filing *Adams II* in advance of issuance of the decision.

The Ninth Circuit's opinion directly conflicts with the published decisional law from every other circuit requiring advance notice of the grounds for imposition of sanctions and the kind of sanctions that are contemplated to be imposed. No advance notice that sanctions under the inherent powers of the trial court was ever provided to Adams. The Ninth Circuit's decision in *Adams II* thus creates a prominent deviation from uniform authority on this issue that can only create confusion in the future. It fatally undermines important due process protections for all litigants within the largest federal circuit. Review by this Court is merited to ensure that these important due process rights are applied consistently throughout the country.

CONCLUSION

For the forgoing reasons, the petition for certiorari should be granted.

Correction of the Ninth Circuit's errors in *Adams II* by this Court should proceed by the relatively efficient pathway of a summary reversal. Because none of the Defendants in this case ever appeared at the trial or appellate level, there is no one who has

proper standing to oppose it or who would even be likely to appear.

Dated this October 3, 2007.

Respectfully submitted,

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APPENDIX

AVRIL ADAMS, Plaintiff-Appellant, v. STATE OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, a public entity; DONNATA MORELAND; OAKTREE INVESTIGATIONS, a business entity and consumer reporting agency; LAURENCE A. CORBIN, individually as an investigator for Oak Tree Investigations; PATRICIA ECHARD; LETTE BAKER; PATRICK KENNELLY, individually and as a supervisor; LAVONNE COEN, Defendants-Appellees.

No. 04-56880

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

487 F.3d 684

December 5, 2006 *, Submitted, Pasadena, California

May 7, 2007, Filed

Before: Harry Pregerson, David R. Thompson, and Richard C. Tallman, Circuit Judges. Opinion by Judge Thompson.

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* This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

COUNSEL

B. Kwaku Duren, Los Angeles, California, for the appellant.

Martin H. Milas, Deputy Attorney General, Los Angeles, California, for the appellees.

OPINION BY: David R. Thompson

OPINION

THOMPSON, Senior Circuit Judge:

Appellant Avril Adams appeals the district court's dismissal with prejudice of her complaint against Appellees the California Department of Health Services ("CDHS"); CDHS employees Donnata Moreland, La Vonne Coen, Patricia Echard, Paulette Baker, and Patrick Kennelly; and Oaktree Investigations and its employee, Laurence Corbin. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's dismissal of Adams's complaint.

I. BACKGROUND

In January 2001, Adams applied for a food and drug inspector ("FDI") position with CDHS. Food and drug inspectors are peace officers and carry firearms;

investigate violations; make arrests; and travel to food storage, processing facilities, and farms. Adams was offered the position she sought, but her actual hiring was conditioned upon her successful completion of a background investigation, including medical and psychological evaluations.

Adams passed the psychological evaluation, but Dr. Stephen G. Weyers notified her that he had recommended restrictions on her ability to perform activities that required maximal exertion and balance. CDHS then advised Adams it was unable to accommodate her medical restrictions, and it withdrew the conditional job offer. Thereafter, Adams took a new treadmill stress test, and Dr. Weyers medically approved her without limitation for the food and drug investigator position.

CDHS then withdrew its medical disqualification of Adams and notified her it would resume her selection process. Adams objected to further investigation. Thereafter, on March 14, 2003, CDHS sent Adams a letter notifying her that it had rescinded its conditional offer of employment. Four days later, on March 18, 2003, the State Personnel Board ("SPB") ruled on Adams's appeal of Dr. Weyers's decision to disqualify her for medical reasons. Because Dr. Weyers had subsequently approved her, the SPB granted Adams's appeal and advised her she would be appointed to the FDI position within 120 days

unless she was unsuccessful in the balance of the selection process.

According to Adams, CDHS then engaged Oaktree Investigations to interview CDHS employees about Adams's behavior during the selection process. Laurence Corbin of Oaktree Investigations interviewed CDHS employees Echard, Kennelly, Moreland, Coen, and Baker on March 27, 2003, and memorialized the results of the interviews in a report dated April 2, 2003.

On April 1, 2003, Adams filed a petition for rehearing with the SPB, arguing that she should be appointed to the FDI position immediately because the selection process ended when she was deemed medically qualified. CDHS filed a response to Adams's petition on May 13, 2003, stating that it withdrew Adams's conditional offer of employment the second time because, during the completion of the investigation process, questions arose regarding Adams's suitability as a peace officer. The response detailed Adams's behavior during the selection process, which behavior included challenging a CDHS employee to a race during the SPB hearing; making numerous phone calls; and sending emails and letters to CDHS employees in which Adams's tone was "rude," "discourteous," "abrupt," "angry," and "challenging in a demeaning way." The response concluded that Adams did not possess the

interpersonal skills, sound judgment, or the ability to follow directions necessary for being an effective peace officer. The SPB denied Adams's petition for rehearing on June 17, 2003.

Adams filed a complaint in state court on November 10, 2003, naming CDHS, Coen, Moreland, and Dr. Weyers as defendants. Adams asserted claims for (1) retaliation in violation of 42 U.S.C. § 1983; (2) violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, and the California Fair Employment and Housing Act, Cal. Gov't Code §§ 12900-12996; (3) denial of due process and civil rights in violation of 42 U.S.C. §§ 1981, 1983, 1985; (4) breach of contract; (5) breach of the implied covenant of good faith and fair dealing; (6) negligence; and (7) declaratory relief. Adams sought damages and a declaration from the court that CDHS's withdrawal of the conditional offer of employment was unlawful.

Adams's complaint also detailed the facts behind the reopening of the background investigation to support her claims for negligence, violations of 42 U.S.C. §§ 1981, 1983, 1985, breach of contract, and declaratory relief. In her complaint, Adams did not allege separate claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681-1681x., or state privacy law, although she alleged that the act of resuming the background investigation was prejudicial, illegal,

unreasonable, discriminatory, retaliatory, and arguably illegal in violation of the FCRA and due process.

Adams's action was removed to federal court on December 8, 2003. *Adams v. Cal. Dep't of Health Servs.*, No. CV-03-8920 (C.D. Cal. filed Dec. 8, 2003). The district court issued a scheduling order setting March 26, 2004, as the deadline for filing motions to amend the complaint or add additional parties.

On July 1, 2004, well past the March 26, 2004 deadline set in the scheduling order, Adams filed a motion for leave to amend her complaint. [*6] Adams wanted to add as defendants Oaktree Investigations and Oaktree investigator Corbin, as well as CDHS employees Echard, Baker, and Kennelly. In her proposed amended complaint she alleged four additional claims: (1) violation of the FCRA; (2) violation of the California Investigative Consumer Reporting Agencies Act ("ICRA"), Cal. Civ. Code §§ 1786-1786.60; (3) infringement of her civil and constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, 1985; and (4) declaratory relief.

Finding that Adams failed to demonstrate good cause for the undue delay in seeking leave to amend, and that granting her motion to amend would prejudice the defendants already named in her complaint, the district court denied Adams's motion as untimely.

The action then proceeded to trial, and a jury found in favor of the defendants. Adams appealed the denial of her motion for leave to amend, among other issues, to our court. In a memorandum disposition, we affirmed the district court's decisions and the judgment in that first case. *Adams v. State of Cal. Dep't of Health Servs.*, No. 05-56857, 220 Fed. Appx. 590, 2007 U.S. App. LEXIS 2814, 2007 WL 464741 (9th Cir. Feb. 7, 2007).

On September 2, 2004, after the district court denied her motion for leave to amend in the first case, Adams filed the complaint in this present case. In her complaint in this case, Adams set forth the four additional claims she had sought to add by her previously denied motion for leave to amend her complaint in the first case. In the present case, the district court determined that Adams's newly filed complaint was duplicative of the complaint she had previously filed in the other case, and the court dismissed the new complaint with prejudice. This appeal followed.

II. STANDARD OF REVIEW

District courts retain broad discretion to control their dockets and "[i]n the exercise of that power they may impose sanctions including, where appropriate, default or dismissal." *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986)

(per curiam); *see also Link v. Wabash R.R.*, 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962). We review for abuse of discretion the district court's dismissal with prejudice of Adams's complaint. After weighing the equities of the case, the district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000); *Walton v. Eaton Corp.*, 563 F.2d 66, 70-71 (3d Cir. 1977) (en banc), *cited with approval in Russ v. Standard Ins. Co.*, 120 F.3d 988, 990 (9th Cir. 1997).

III. DISCUSSION

Adams filed her present complaint in an attempt to avoid the consequences of her own delay and to circumvent the district court's denial of her untimely motion for leave to amend her first complaint. However, as the Tenth Circuit stated in *Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp.*, "the fact that plaintiff was denied leave to amend does not give h[er] the right to file a second lawsuit based on the same facts." 296 F.3d 982, 989 (10th Cir. 2002) (internal quotation marks omitted). Plaintiffs generally have "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the

same defendant." *Walton*, 563 F.2d at 70; *see also Curtis*, 226 F.3d at 138-39; *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985); *Zerilli v. Evening News Ass'n*, 202 U.S. App. D.C. 217, 628 F.2d 217, 222 (D.C. Cir. 1980); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851 (1st Cir. 1947).

We find that Adams's later-filed complaint is duplicative of her earlier-filed complaint and, further, that given the circumstances of this case, the district court did not abuse its discretion in dismissing Adams's later-filed complaint with prejudice.[5]

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[5] We note that we are affirming the district court's dismissal on the basis that the second action was duplicative of the first, and not on the basis that the district court had the discretion to dismiss the second action as a sanction for failing to comply with the Rule 16 scheduling order issued in the first action. *Cf. Atchison, Topeka, & Santa Fe Ry. Co. v. Hercules, Inc.*, 146 F.3d 1071, 1073 74 (9th Cir. 1998) (holding that district court abused its discretion in dismissing a second-filed action with prejudice where plaintiff's claims against a third-party defendant were permissive, not mandatory, under Federal Rule of Civil Procedure 14). Unlike the plaintiff in *Atchinson*, Adams was required to bring all of her claims against the defendants and their privies arising from a single cause of action in one suit. Thus, because the filing of a duplicative complaint was abusive, our affirmance of the district court's dismissal does not contravene the rule established in *Atchinson* that "district courts have inherent power to control their dockets, but not

A. Duplicative Complaint

To determine whether a suit is duplicative, we borrow from the test for claim preclusion. As the Supreme Court stated in *United States v. The Haytian Republic,* "the true test of the sufficiency of a plea of 'other suit pending' in another forum [i]s the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit." 154 U.S. 118, 124, 14 S. Ct. 992, 38 L. Ed. 930 (1894); *see also Hartsel Springs Ranch,* 296 F.3d at 987 n.1 ("[I]n the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion."); *Curtis,* 226 F.3d at 139-40 ("[T]he normal claim preclusion analysis applies and the court must assess whether the second suit raises issues that should have been brought in the first."); *Davis v. Sun Oil Co.,* 148 F.3d 606, 613 (6th Cir. 1998) (per curiam) (referring to the doctrine against claim-splitting as "the 'other action pending' facet of the res judicata doctrine").

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when its exercise would nullify the procedural choices reserved to parties under the federal rules." *Id.* at 1074.

Thus, in assessing whether the second action is duplicative of the first, we examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same. *See The Haytian Republic,* 154 U.S. at 124 ("There must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the . . . essential basis, of the relief sought must be the same." (internal quotation marks omitted)); *Curtis,* 226 F.3d at 140 (holding that the trial court did not abuse its discretion in dismissing "*Curtis II* claims arising out of the same events as those alleged in *Curtis I*," which claims "would have been heard if plaintiffs had timely raised them"); *Serlin,* 3 F.3d at 223 ("[A] suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions." (internal quotation marks omitted)).

1. Same Causes of Action

We examine first whether the causes of action in Adams's two suits are identical. To ascertain whether successive causes of action are the same, we use the transaction test, developed in the context of claim preclusion. "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Western Sys.,*

Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992) (*citing* Restatement (Second) of Judgments § 24(1) (1982)). In applying the transaction test, we examine four criteria:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Costantini v. Trans World Airlines,* 681 F.2d 1199, 1201-02 (9th Cir. 1982). "The last of these criteria is the most important." *Id.* at 1202.

Here, it is clear that the two actions share a common transactional nucleus of facts. The first complaint detailed the factual allegations surrounding the reopening of Adams's background investigation and used those allegations to support claims under the legal theories of negligence; violations of 42 U.S.C. §§ 1981, 1983, 1985; breach of contract; and declaratory relief. Adams's first complaint specifically cited as support for her claims against Coen, Moreland, and Dr. Weyers under 42 U.S.C. §§ 1981, 1983, 1985, the same negative comments from CDHS employees during the selection process that she used to support her claims in the present action. The present complaint differs only in that it identifies the CDHS

employees who made the negative comments, names those CDHS employees and Corbin and Oaktree Investigations as defendants, and advances two new legal theories of recovery under the FCRA and the ICRA. The two other claims -- one under 42 U.S.C. §§ 1981, 1983, 1985 and one seeking declaratory relief -- are identical to those asserted in the first complaint. As Adams herself concedes, the claims in both complaints relate to the same set of facts and form a convenient trial unit because they "disclose[] a cohesive narrative" of Adams's relationship with CDHS and the disputed withdrawal of the conditional job offer after the continuation of the background investigation. *Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005).

In addition, any judgment in the present action necessarily would destroy or impair rights and interests established by the judgment in the first action. As Adams alleges in her present complaint, both the FCRA and the ICRA require consent to and disclosure of an investigation. *See* 15 U.S.C. § 1681b(b); Cal. Civil Code §§ 1786.10-.12. However, the central issues raised in the present complaint surrounding the legality of the reopening of Adams's background investigation -- whether the selection process was complete after Adams was medically cleared, whether CDHS lost the right to resume the background investigation when it rescinded for the first time Adams's conditional offer of employment,

or whether the background investigation had never been completed and Adams's consent to the investigation remained valid -- were squarely raised and argued by Adams in her claim for declaratory relief in the first complaint.

Furthermore, although Adams argues that the additional report she uncovered on January 17, 2004, written by Oaktree Investigations and containing affidavits from Kennelly, Echard, and Baker, constitutes "new" evidence, the report cannot be said to be "new" in any sense because, as Adams states in her complaint, it was dated April 3, 2003 and was provided to Adams by CDHS during discovery in the first action. In addition, the report is merely cumulative of CDHS's response of May 13, 2003 to Adams's petition for rehearing before the SPB, which explained that CDHS had withdrawn Adams's conditional offer of employment because of her behavior in the balance of the selection process. Adams in her first complaint quotes liberally from CDHS's response as factual support for her claims. Thus, the additional evidentiary detail surrounding Echard's and Baker's comments in the Oaktree Investigations report "is scarcely enough to establish that the instant lawsuit arises out of a different 'transactional nucleus of facts' than that which generated the [first] suit." *Costantini*, 681 F.2d at 1202; *cf. International Union of Operating Engineers-Employers Constr. Indus. Pension, etc. v. Karr*, 994

F.2d 1426, 1430 (9th Cir. 1993) ("The fact that some different evidence may be presented in this action . . . does not defeat the bar of res judicata.").

In addition, the key evidence presented during trial in the first action regarding Adams's claim of retaliation was the testimony of CDHS employees Moreland and Coen concerning Adams's behavior during the selection process. Kennelly, Echard, Baker, and Corbin all submitted declarations in the first action regarding the information gathered during the reopened background investigation in support of CDHS's motion for summary judgment. As the district court stated in its order denying Adams's motion for a new trial in the first action, "[t]his case largely turned on the jury's assessment of the credibility of the defendants, who explained why they determined not to finalize their conditional offer of employment to [Adams]."

Finally, although the FCRA and the ICRA establish distinct rights enforceable by litigants, this factor alone does not differentiate the causes of action. *Cf. Derish v. San Mateo-Burlingame Bd. of Realtors,* 724 F.2d 1347, 1349 (9th Cir. 1983), *overruling on other grounds recognized by Eichman v. Fotomat Corp.,* 759 F.2d 1434, 1437 (9th Cir. 1985). Indeed, in the claim preclusion context, the most significant factor is that the causes of action arise from a common transactional nucleus of facts. *See, e.g., Western Sys.,*

958 F.2d at 871; *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987); *Costantini*, 681 F.2d at 1201. Moreover, Adams seeks substantially the same relief in both actions -- compensatory, exemplary, and punitive damages for the reopening of the background investigation and the withdrawal of her conditional offer of employment, allegedly in violation of her statutory and constitutional rights, and a declaratory judgment that CDHS unlawfully reopened her background investigation and withdrew her conditional offer of employment.

It is clear that the claims in Adams's present complaint arise out of the same transactional nucleus of facts asserted in her first action and that rights established by the judgment in the first action would be destroyed or impaired by a judgment in the present action. It is also plain that substantially the same evidence was and would be presented in both actions. Thus, under the *Costantini* factors, we conclude that the two suits involve the same cause of action.

2. Same Parties or Privies

While Adams's present complaint names five additional defendants, these new defendants are in privity with CDHS, because CDHS can be said to have "virtually represented" the new defendants in the first action. *See Kourtis v. Cameron*, 419 F.3d

989, 996 (9th Cir. 2005). Although the concept of privity traditionally applied to a narrow class of relationships in which "a person [is] so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved," we have expanded the concept to include a broader array of relationships which fit under the title of "virtual representation." *Id.* (internal quotation marks omitted). The necessary elements of virtual representation are an identity of interests and adequate representation. *Id.* Additional features of a virtual representation relationship include "'a close relationship, substantial participation, and tactical maneuvering.'" *Id.* (*quoting Irwin v. Mascott,* 370 F.3d 924, 930 (9th Cir. 2004)).

Here, three of the new defendants -- Patricia Echard, Paulette Baker, and Patrick Kennelly -- were employees of CDHS at the time of the events described in both of Adams's complaints and thus had a close relationship with both CDHS and the CDHS employees named as defendants in the first complaint. *See Irwin,* 370 F.3d at 930-31 (finding senior corporate officer virtually represented by his corporation). In addition, all three participated in the first action by submitting in support of CDHS's motion for summary judgment declarations regarding their participation in Adams's background investigation. Moreover, the interests of the three

new employee-defendants are aligned with CDHS because CDHS's liability was predicated largely upon a finding of wrongdoing by its employees.

Furthermore, although the last two new defendants, Laurence Corbin and Oaktree Investigations, are not employees of CDHS, they maintained a close relationship with CDHS as agents hired to conduct the background investigation and possessed an identity of interest with CDHS. Corbin and Oaktree Investigations also participated in the first action by submitting declarations in support of CDHS's motion for summary judgment.

Finally, CDHS adequately represented the five new defendants named in the present action and Adams makes no allegations to the contrary. CDHS consistently maintained that the reopening of the background investigation and the withdrawal of Adams's job offer were legal and proper under the circumstances and that its employees and agents acted lawfully. No conflicts central to the issues in this litigation exist between CDHS and the five new defendants. *Cf. Kourtis,* 419 F.3d at 998 (concluding no virtual representation existed where an agency relationship existed, but the interests of the parties were adverse).

B. No Abuse of Discretion

Although the district court alternatively could have opted to dismiss Adams's later-filed complaint without prejudice, to consolidate the two actions, or to stay or enjoin proceedings, under the circumstances of this case, the district court did not abuse its discretion in electing to dismiss the second action with prejudice.[6] *Cf. Kerotest Mfg. Co. v. C-O-*

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[6] We recognize that in some circumstances a dismissal with prejudice of a later-filed action may act to bar an earlier-filed action. *See, e.g., Marin v. HEW, Health Care Fin. Agency*, 769 F.2d 590, 593 (9th Cir. 1985) ("Even without a determination which is literally on the merits, a denial with prejudice may be a final judgment with a res judicata effect as long as the result is not unfair." (emphasis added)). However, according res judicata effect to the dismissal with prejudice of the second suit would be error in this case because Adams would have been deprived of a full and fair opportunity to litigate her first action. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480-81, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) ("the judicially created doctrine of collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue"); *Clements v. Airport Auth.*, 69 F.3d 321, 328 (9th Cir. 1995) ("[W]e do not give preclusive effect to judgments rendered in proceedings that fail to comply with the minimum standards of due process. In other words, the party against whom preclusion is urged must have had a 'full and fair opportunity' to litigate his claim."). In any case, the issue is moot as the defendants here never sought to assert res judicata as a defense in the first action. *See* Fed. R. Civ. P. 8(c) (res judicata is affirmative

Two Fire Equip. Co., 342 U.S. 180, 183, 72 S. Ct. 219, 96 L. Ed. 200, 1952 Dec. Comm'r Pat. 407 (1952) ("Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems."). In a situation such as here, where one district court had duplicative suits contemporaneously pending on its docket, we conclude, as did the Supreme Court in an analogous situation, that "[n]ecessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower court[]." *Id.* at 183-84; *see also id.* at 184 ("Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours.").

Dismissal of the duplicative lawsuit, more so than the issuance of a stay or the enjoinment of proceedings, promotes judicial economy and the "comprehensive disposition of litigation." *Id.* at 183. In dismissing the duplicative suit with prejudice, the district court acted to protect the parties from vexatious and expensive litigation and to serve the societal interest in bringing an end to disputes. *Cf. Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66

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defense); *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) ("Res judicata is a waivable defense.").

L. Ed. 2d 308 (1980) (res judicata relieves parties of cost of multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication); *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979) (res judicata "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes"); 18 Moore's Federal Practice P 131.12 (3d ed. 1999).

While we might have found an abuse of discretion had the claims in Adams's second suit been based on events occurring subsequent to the filing of her complaint in the first action, that is not the case here. *Cf. Curtis*, 226 F.3d at 139-40 (reversing the district court's dismissal of claims in the second action arising out of events occurring subsequent to the filing of complaint in the first action). To the contrary, Adams had a full and fair opportunity to raise and litigate in her first action the claims she now asserts in this action. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) ("[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." (internal quotation marks omitted)); *Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 458 (9th Cir. 1980) ("The question [before applying res judicata to bar the second suit] is . . . whether [plaintiff] had a fair opportunity to

litigate that claim before a competent court prior to bringing it to the court below.").

The allegedly illegal background investigation conducted by Oaktree Investigations occurred in March 2003, eight months before Adams filed her first action in state court in November 2003. In addition, the April 2003 Oaktree Investigations report upon which Adams bases her claims under the FCRA and the ICRA was made available to Adams as part of the discovery materials provided by CDHS. Adams herself admits that she uncovered this report on January 17, 2004, more than two months prior to the deadline in the first action for amending the complaint.

Moreover, it is clear that Adams had knowledge of the factual basis undergirding her FCRA and ICRA claims when she filed the complaint in the first action. Adams's petition for rehearing to the SPB squarely raised the issue of whether CDHS was permitted to resume its background investigation of her after the medical disqualification was withdrawn. In addition, the facts surrounding the allegedly illegal background investigation were laid out in CDHS's response of May 2003 to Adam's petition for rehearing before the SPB; CDHS used the information gleaned from the March 2003 investigation as additional support for its withdrawal of Adams's conditional offer of employment.

Significantly, Adams in her first complaint outlined the facts gleaned from the reopened background investigation and posited that the reopening of the investigation was "arguably illegal based upon the Fair Credit Reporting Act."

Adams was required to bring at one time all of the claims against a party or privies relating to the same transaction or event. *See N. Assur. Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000); *Nilsen v. City of Moss Point*, 701 F.2d 556, 564 (5th Cir. 1983) (en banc); Restatement (Second) of Judgments § 25, cmt. b (1982) ("It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late.").

The district court acted within its discretion in dismissing Adams's duplicative complaint with prejudice and preventing her from "fragment[ing] a single cause of action and litigat[ing] piecemeal the issues which could have been resolved in one action." *Flynn v. State Bd. of Chiropractic Exam'rs*, 418 F.2d 668, 668 (9th Cir. 1969) (per curiam).

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AVRIL ADAMS, Plaintiff-Appellant, v. STATE OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, a public entity; DONNATA MORELAND; OAKTREE INVESTIGATIONS, a business entity and consumer reporting agency; LAURENCE A. CORBIN, individually as an investigator for Oak Tree Investigations; PATRICIA ECHARD; LETTE BAKER; PATRICK KENNELLY, individually and as a supervisor; LAVONNE COEN, Defendants-Appellees.	No. 04-56880 D.C. CV-O4-07313-GAF Central District of California, Los Angeles

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Submitted December 5, 2006*
Pasadena, California
Filed February 13, 2007
Before: Harry Pregerson, David R. Thompson, and
Richard C. Tallman, Circuit Judges.

Opinion by Judge Thompson

COUNSEL

B. Kwaku Duren, Los Angeles, California, for the appellant.

Martin H. Milas, Deputy Attorney General, Los Angeles, California, for the appellees.

OPINION

THOMPSON, Senior Circuit Judge:

Appellant Avril Adams appeals the district court's dismissal with prejudice of her complaint against Appellees the California Department of Health Services ("CDHS"); CDHS employees Donnata Moreland, La Vonne Coen, Patricia Echard, Paulette Baker, and Patrick Kennelly; and Oaktree Investigations and its employee, Laurence Corbin. We havejurisdiction under 28 USCA § 1291, and we affirm the district court's dismissal of Adams's complaint.

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* *This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

I. BACKGROUND

In January 2001, Adams applied for a food and drug inspector ("FDI") position with CDHS. Food and drug inspectors are peace officers and carry firearms, investigate violations, make arrests, and travel to food storage, processing facilities and farms. Adams was offered the position she sought, but her actual hiring was conditioned upon her successful completion of a background investigation, including medical and psychological evaluations.

Adams passed the psychological evaluation, but Dr. Stephen G. Weyers notified her that he had recommended restrictions on her ability to perform activities that required maximal exertion and balance. CDHS then advised Adams it was unable to accommodate her medical restrictions and it withdrew the conditional job offer. Thereafter, Adams took a new treadmill stress test, and Dr. Weyers medically approved her without limitation for the food and drug investigator position.

CDHS then withdrew its medical disqualification of Adams and notified her it would resume her selection process. Adams objected to further investigation. Thereafter, CDHS notified her that it rescinded its conditional offer of employment. Four days later, the State Personnel Board ("SPB") ruled on Adams's appeal of Dr. Weyers's decision to disqualify her for medical reasons. Because Dr. Weyers subsequently approved her, SPB granted Adams's appeal and advised her she would be appointed to the FDI position within 120 days unless she was unsuccessful

in the balance of the selection process.

On April 1, 2003, Adams filed a petition for rehearing with the SPB. CDHS filed a response to Adams's petition, stating that it withdrew Adams's conditional offer of employment the second time because, during the completion of the investigation process, questions arose regarding Adams's suitability as a peace officer. The response detailed Adams's behavior during the selection process, which included challenging a CDHS employee to a race during the SPB hearing, making numerous phone calls, and sending emails and letters to CDHS employees in which Adams's tone was "rude," "discourteous," "abrupt," "angry," and "challenging in a demeaning way." The response concluded that Adams did not possess the interpersonal skills, sound judgment, or the ability to follow directions necessary for being an effective peace officer. The SPB denied Adams's petition for rehearing on June 17, 2003.

Adams filed a complaint in state court on November 10, 2003, naming CDHS, Coen, Moreland, and Dr. Weyers as defendants. Adams asserted claims for (1) retaliation in violation of 42 USCA § 1983; (2) violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.*; (3) denial of due process and civil rights in violation of 42 USCA §§ 1981, 1983, 1985; (4) breach of contract; (5) breach of the implied covenant of good faith and fair dealing; (6) negligence; and (7) declaratory relief. Adams\ sought

damages and a declaration from the court that CDHS's withdrawal of the conditional offer of employment was unlawful.

Adams's complaint also detailed the facts behind the reopening of the background investigation to support her claims for negligence, violations of 42 USCA §§ 198142 [sic] 42 U.S.C. §§ 1981, 1983, 1985, breach of contract, and declaratory relief. In her complaint, Adams did not allege separate claims under the Fair Credit Reporting Act ("FCRA"), 15 USCA § 1681 *et seq.*, or state privacy law, although she alleged that the act of resuming the background investigation was prejudicial, illegal, unreasonable, discriminatory, retaliatory, and arguably illegal in violation of the FCRA and due process.

Adams's action was removed to federal court on December 8, 2003. *Adams v. Cal. Dep't of Health Servs.*, No. CV-03- 8920 (C.D. Cal. filed Dec. 8, 2003). The district court issued a scheduling order setting March 26, 2004, as the deadline for filing motions to amend the complaint or add additional parties. On July 1, 2004, well past the March 26, 2004 deadline set in the scheduling order, Adams filed a motion for leave to amend her complaint. Adams wanted to add as defendants Oaktree Investigations and Oaktree investigator Corbin, as well as CDHS employees Echard, Baker, and Kennelly. In her proposed amended complaint she alleged four additional claims: (1) violation of the FCRA; (2) violation of the California Investigative Consumer Reporting Agencies Act ("ICRA"), CA CIVIL § 1786 *et seq.*; (3) infringement of her civil and constitutional rights in

violation of 42 USCA §§ 198142 U.S.C. §§ 1981, 1983, 1985; and (4) declaratory relief.

Finding that Adams failed to demonstrate good cause for the undue delay in seeking leave to amend, and that granting her motion to amend would prejudice the defendants already named in her complaint, the district court denied Adams's motion as untimely. The action then proceeded to trial and a jury found in favor of the defendants. Adams appealed the denial of her motion for leave to amend, among other issues, to our court. In a memorandum disposition filed February 7, 2007, we have affirmed the district court's decisions and the judgment in that first case. *Adams v. State of Cal. Dep't of Health Servs.*, No. 05-56857 (9th Cir. filed February 7, 2007).

On September 2, 2004, after the district court denied her motion for leave to amend in the first case, Adams filed the complaint in this present case. In her complaint in this case, Adams set forth the four additional claims she had sought to add by her previously denied motion for leave to amend her complaint in the first case. In the present case, the district court determined that Adams's newly filed complaint was duplicative of the complaint she had previously filed in the other case, and the court dismissed the new complaint with prejudice. This appeal followed.

II. STANDARD OF REVIEW

District courts retain broad discretion to control their dockets and "[i]n the exercise of that power they may

impose sanctions including, where appropriate, default or dismissal." *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986); *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962). We review for abuse of discretion the district court's dismissal of Adams's complaint. A district court has discretion to dismiss a later-filed action, to stay that action pending resolution of the previously filed action, or to consolidate both actions. *See Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000); *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) (en banc) (*cited with approval in Russ v. Standard Ins. Co.*, 120 F.3d 988, 990 (9th Cir. 1997)).

III. DISCUSSION

[1] The rule against duplicative litigation is distinct from, but closely related to, the doctrine of claim preclusion, and the two doctrines serve many of the same policies. Dismissal of a duplicative lawsuit, like claim preclusion (sometimes referred to as *res judicata*) serves judicial economy and the "comprehensive disposition of litigation." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952). Moreover, dismissal of a duplicative suit protects the parties from vexatious and expensive litigation and serves the societal interest in bringing an end to disputes. *Cf. Allen v. McCurry*, 449 U.S. 90, 94 (1980) (*res judicata* relieves parties of cost of multiple lawsuits, conserves judicial resources, and encourages reliance on adjudication); *Brown v. Felsen*, 442 U.S. 127, 131 (1979) (*res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve

other disputes"); 18 Moore's Federal Practice ¶ 131.12 (3d ed. 1999).

Dismissal of a duplicative suit is an appropriate remedy because plaintiffs have "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant." *Walton*, 563 F.2d at 70; *see also Curtis*, 226 F.3d at 138-39; *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985); *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 222 (D.C. Cir. 1980); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 851 (1st Cir. 1947).

[2] The test for whether a suit is duplicative and subject to dismissal is substantially equivalent to the test for claim preclusion. As the Supreme Court stated in *United States v. The Haytian Republic*, "the true test of the sufficiency of a plea of 'other suit pending' in another forum [i]s the legal efficacy of the first suit, when finally disposed of, as 'the thing adjudged,' regarding the matters at issue in the second suit." 154 U.S. 118, 124 (1894). The doctrine of claim preclusion bars " 'all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the\ same parties . . . on the same cause of action, if the prior suit\ concluded in a final judgment on the merits.' " *Int'l Union of Operating Eng'rs-Employers Constr. Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993) (alteration in original) (quoting *Ross v. Int'l Bhd. of Elec. Workers*, 634 F.2d 453, 457 (9th Cir. 1980)); *see also Mpoyo v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th

Cir. 2005).

[3] Thus, to determine whether the district court abused its discretion in dismissing Adams's present complaint with prejudice because it was duplicative of her first complaint, we assess what claim preclusive effect the judgment on the merits in her first action would have on the present action.

A. Same Cause of Action

[4] We examine first whether the claims in Adams's present action were based on the same claims asserted in her first action. In determining whether successive claims are the same, we consider four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same rights; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Constantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982). "The last of these criteria is the most important." *Id.* at 1202.

[5] We use a transaction test to determine whether the two suits share a common nucleus of facts. "Whether two events are part of the same

transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992) (citing Restatement (Second) Judgments § 24(1) (1982)).

[6] Here, it is clear that the two actions share a common transactional nucleus of facts. The first complaint detailed the factual allegations surrounding the reopening of Adams's background investigation and used those allegations to support claims under the legal theories of negligence, violations of 42 USCA §§ 198142 U.S.C. §§ 1981, 1983, 1985, breach of contract, and declaratory relief. Adams's first complaint specifically cited as support for her claims against Coen, Moreland, and Dr. Weyers under 42 USCA §§ 198142 U.S.C. §§ 1981, 1983, 1985, the same negative comments from CDHS employees during the selection process that she used to support her claims in the present action. The present complaint differs only in that it identifies the CDHS employees who made the negative comments, names those CDHS employees and Corbin and Oaktree Investigations as defendants, and advances two new legal theories of recovery under the FCRA and the ICRA. The two other claims — one under 42 U.S.C. §§ 1981, 1983, 1985 and one seeking declaratory relief — are identical to those asserted in the first complaint. As Adams herself concedes, the claims in both complaints relate to the same set of facts and form a convenient trial unit because they "disclose[ ] a cohesive narrative" of Adams's relationship with CDHS and the disputed withdrawal of the conditional job offer after the

continuation of the background investigation. *Mpoyo*, 430 F.3d at 987.

[7] That the additional legal theories of recovery under the FCRA and ICRA were not raised as separate claims in Adams's first complaint does not by itself permit her to present those claims in a subsequent complaint, because a litigant "is not permitted to fragment a single cause of action and to litigate piecemeal the issues which could have been resolved in one action." *Flynn v. State Bd. of Chiropractic Examiners*, 418 F.2d 668, 668 (9th Cir. 1969) (per curiam). "Res judicata [or claim preclusion] prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown*, 442 U.S. at 131. Adams "cannot avoid the bar of res judicata merely by alleging conduct by the defendant not alleged in [her] prior action or by pleading a new legal theory." *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986).

[8] It is clear that the FCRA and ICRA theories of recovery were available to Adams in the first action because Adams obtained the report on the reopened background investigation from the discovery materials provided by CDHS prior to the deadline set for filing a motion to amend the complaint. Adams admits that she obtained this report on January 17, 2004, more than two months prior to the deadline for amending the complaint. Moreover, Adams herself posited in the first complaint that the reopening of the background investigation was "arguably illegal

based upon the Fair Credit Reporting Act." Therefore, the principle that "[c]laim preclusion bars the assertion of any theory of recovery that could have been asserted in the first action," *Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992), applies with particular force here.

[9] In addition, any judgment in the present action necessarily could destroy or impair rights and interests established by the judgment in the first action. As Adams alleges in her present complaint, both the FCRA and the ICRA require consent to and disclosure of an investigation. *See* 15 U.S.C. § 1681b(b); Cal. Civil Code §§ 1786.10-.12. However, the central issues raised in the present complaint surrounding the legality of the reopening of Adams's background investigation— whether the selection process was complete after Adams was medically cleared, whether CDHS lost the right to resume the background investigation when it rescinded for the first time Adams's conditional offer of employment, or whether the background investigation had never been completed and Adams's consent to the investigation remained valid — were squarely raised and argued by Adams in her claim for declaratory relief in the first complaint. Furthermore, although Adams argues that the additional report she uncovered on January 17, 2004, containing the affidavits from Kennelly, Echard, and Baker, is new evidence, the additional evidentiary detail surrounding Echard's and Baker's comments "is scarcely enough to establish that the instant lawsuit arises out of a different 'transactional nucleus of facts' than that which generated the [first] suit."

Constantini, 681 F.2d at 1202. "The fact that some different evidence may be presented in this action . . . does not defeat the bar of res judicata." *Karr*, 994 F.2d at 1430.

Significantly, the key evidence presented during trial in the first action regarding Adams's claim of retaliation was the testimony of CDHS employees Moreland and Coen regarding Adams's behavior during the selection process. In addition, Kennelly, Echard, Baker and Corbin all submitted declarations in the first action regarding the information gathered during the reopened background investigation in support of CDHS's motion for summary judgment. As the district court stated in its order denying Adams's motion for a new trial in the first action, "[t]his case largely turned on the jury's assessment of the credibility of the defendants, who explained why they determined not to finalize their conditional offer of employment to [Adams]."

Finally, although the FCRA and the ICRA establish distinct rights enforceable by litigants, this factor alone does not defeat the preclusive effect of the first action. *See Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1349 (9th Cir. 1983), *overruling on other grounds recognized by Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985). Indeed, we have applied the doctrine of claim preclusion on the ground that two claims arose out of the same transaction, without relying upon other factors. *See, e.g., Karr*, 994 F.2d at 1430-31; *Ulloa*, 958 F.2d at 871; *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987).

[10] It is clear that the claims in Adams's present complaint arise out of the same transactional nucleus of facts asserted in her first action and that rights established by the judgment in the first action could be destroyed or impaired by a judgment in the present action. It is also plain that substantially the same evidence was and would be presented in both actions.

B. Final Judgment on the Merits

[11] Although the district court's order denying as untimely Adams's motion to amend does not satisfy the claim preclusion requirement of a final judgment, the preclusive bar here is based not on the decision denying leave to amend, but rather on the transactional nucleus of the facts underlying the claims asserted in the two actions, and the requirement that a plaintiff must bring at one time all claims against a defendant relating to the same transaction or event. *See N. Assur. Co. of Am. v. Square D Co.*, 201 F.3d 84, 88 (2d Cir. 2000); *Nilsen v. City of Moss Point*, 701 F.2d 556, 564 (5th Cir. 1983) (en banc); Restatement (Second) of Judgments § 25, cmt. B (1982) ("It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late."). As the Third Circuit stated, " 'the fact that the plaintiff was denied leave to amend does not give h[er] the right to file a second lawsuit based on the same facts.' " *Huck v. Sea Air Shuttle Corp.*,

106 F.3d 45, 50 (3d Cir. 1997) (*quoting Sendi v. NCR Comten, Inc.*, 624 F. Supp. 1205, 1207 (E.D. Pa. 1986)).

C. Same Parties or Privies

[12] While Adams's present complaint names five additional defendants, the privity requirement of claim preclusion is satisfied because these defendants were "virtually represented" by the defendants in the first action. Although the concept of privity traditionally applied to a narrow class of relationships in which "a person [is] so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved," we have *419 F.3d 989* [sic] expanded the concept to include a broader array of relationships which fit under the title of "virtual representation." *Kourtis v. Cameron*, 419 F.3d 989, 996 (9th Cir. 2005) (internal quotation marks omitted). The necessary elements of virtual representation are an identity of interests and adequate representation. *419 F.3d 989Id.* Additional features of a virtual representation relationship include " 'a close relationship, substantial participation, and tactical maneuvering.'" *Id.* (quoting *Irwin v. Mascott,* 370 F.3d 924, 930 (9th Cir. 2004)).

[13] Here, three of the new defendants — Patricia Echard, Paulette Baker, and Patrick Kennelly — were employees of CDHS at the time of the events described in both of Adams's complaints and had a close relationship with the defendants named in the

first complaint. *See Irwin*, 370 F.3d at 930-31 (finding senior corporate officer virtually represented by his corporation). In addition, all three participated in the first action by submitting in support of CDHS's motion for summary judgment declarations regarding their participation in Adams's background investigation. Moreover, their interests were identical to those of the defendants in the first action.

[14] Furthermore, although the last two new defendants, Laurence Corbin and Oaktree Investigations, were not employees of CDHS, they maintained a close relationship with CDHS as agents hired to conduct the background investigation and possessed an identity of interest with CDHS. Corbin and Oaktree Investigations also participated in the first action by submitting declarations in support of CDHS's motion for summary judgment.

[15] Finally, CDHS and the other defendants named in the first complaint adequately represented the five new defendants named in the present action by consistently maintaining that both the reopening of the background investigation and the withdrawal of Adams's job offer were legal and proper under the circumstances. *Cf. Kourtis*, 419 F.3d at 998 (concluding no virtual representation existed where an agency relationship existed, but the interests of the parties were adverse).

D. Full and Fair Opportunity to Litigate

[16] Adams filed her present complaint in an

attempt to avoid the consequences of her own delay and to circumvent the district court's denial of her motion for leave to amend her first complaint. Application of claim preclusion to dismiss Adams's present complaint does not unfairly deprive Adams of her day in court because Adams had a full and fair opportunity to raise and litigate in her first action the claims she now asserts in this action. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) ("[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." (internal quotation marks omitted)); *Ross*, 634 F.2d at 458 ("The question [before applying res judicata to bar the second suit] is . . . whether [plaintiff] had a fair opportunity to litigate that claim before a competent court prior to bringing
it to the court below.").

CONCLUSION

[17] The district court did not abuse its discretion by dismissing with prejudice the duplicative complaint Adams filed in this case.

AFFIRMED.

UNITED STATES DISTRICT COURT Link to: 26
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES GENERAL

Case No. CV 03-8920; CV 04-7313 GAF

Date: September 14, 2004

Title: Adams v. State of California, et. al.

THE HONORABLE GARY ALLEN FEESS, JUDGE

Marilynn Morris	None Present
Courtroom Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: (In Chambers)

On July 29, 2004 this Court denied Plaintiff's motion for leave to amend her complaint. (7/29/04 Ord.) In that Order the Court remarked that Plaintiff had not demonstrated a good cause basis for amendment of the complaint or this Court's scheduling order because the grounds for the motion

were "not only known 69 days prior to the cut-off date set by the Court in its scheduling order but were know even prior to the entry of the scheduling order," yet Plaintiff failed to file a motion to amend until 195 days after having notice of the information that could establish a ground for amendment. Moreover, Plaintiff provided no excuse of the delayed filing (Id.)

After this Court issued its order denying the motion to amend, Plaintiff filed an untimely reply brief to Defendant's opposition to the motion to amend. Plaintiff offered no excuse for the delayed filing, yet the Court did not decline to consider the reply on timeliness grounds. Rather the Court found that the reply did not change the Court's analysis in the disposition of the matter. (7/30/04 Ord.).

Despite the fact that this Court had refused to permit Plaintiff to pursue these new allegation, it came to the Court's attention that Plaintiff attempted to circumvent this Court's order by filing a new action, Adams v. State of California et al., CV 04-7313, against Defendants, alleging the identical facts that were the subject of the motion to amend – motion this Court unequivocally ***denied.***

Accordingly, on September 20,2004, the Court ordered Plaintiff to show cause why (1) the new action should not be dismissed, and (2) why sanctions should not be imposed pursuant to FED. R. CIV. P. 11. Plaintiff's response to the order to show cause was due on or before Friday, September 24, 2004 at 4:00 p.m.

On September 24, 2004, Plaintiff filed a response to this Court's order to show cause. Therefore, the Court **VACATES** the order to show cause.

Plaintiff's filing, which failed to cite to ***any*** supporting legal authority, made it abundantly clear that dismissal of the newly filed action is appropriate. Accordingly, Plaintiff's newly filed action – Case No. CV 04-7313-is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

Docketed on CIVIL

SEP 29 2004

BY [illegible] 005

Minutes Form

CIVIL-GEN Initials of Courtroom Deputy Clerk
[illegible]

FILED
JULY 05, 2007
Cathy Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AVRIL ADAMS,
Plaintiff-Appellant,
v.

STATE OF CALIFORNIA DEPARTMENT OF HEALTH SERVICES, a public entity; DONNATA MORELAND; OAKTREE INVESTIGATIONS, a business entity and consumer reporting agency; LAURENCE A. CORBIN, individually as an investigator for Oak Tree Investigations; PATRICIA ECHARD; LETTE BAKER; PATRICK KENNELLY, individually and as a supervisor; LAVONNE COEN,
Defendants-Appellees.

No. 04-56880

D.C. CV-O4-07313-GAF
Central District of California, Los Angeles

Before: Pregerson, Thompson, and Tallman, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny appellant Adams' petition for rehearing. Judges Pregerson and Tallman have both voted to deny her petition for rehearing en banc, and Judge Thompson has recommended denial.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and rehearing by the court en banc are DENIED.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any person...be deprived of life, liberty, or property, without due process of law." U.S. Const., Amend. V, § 1.

California Code of Civil Procedure Sections 335 and 335.1 read as follows:

> 335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:
>
> 335.1. Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

Federal Rules of Civil Procedure 41(a)(1) reads as follows:

> Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing

a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.